FILED
OCT 30 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-503

EDWARD C. BELL,
Petitioner,

v.

RICHARD D. HONGISTO, Sheriff of the City and County of San Francisco, State of California,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

B. E. BERGESEN, III
693 Mission St., 2nd Floor
San Francisco, CA 94105
(415) 495-6420

BENJAMIN DREYFUS
ALLAN BROTSKY
1256 Market Street
San Francisco, CA 94105
(415) 864-3131
Attorneys for Petitioner

BORG PRINTING COMPANY OF CALIFORNIA, 546 FIRST STREET, SAN FRANCISCO 94105

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
I. It Is Important That This Court Determine Whether the Denial, to an Attorney Who Was Summarily Convicted of Contempt While Representing Criminal Defendants, of an Appeal and of Bail Pending Appeal, Rights Available to All Other Criminal Defendants in California, Violates His Right to Equal Protection and Their Right to Competent and Vigorous Legal Representation	10
II. The Decision Below, Which Permits Conviction and Punishment for Contempt Without Ever Affording the Contemnor One Full and Fair Hearing, Conflicts With Many Due Process Principles Announced by This Court and With the Decisions of This Court in *In Re Green*, 369 U.S. 689 (1962) and *Taylor v. Hayes*, ... U.S. ....., 94 S.Ct. 2697 (1974)	19
Conclusion	24
Appendices	
Opinion of the Court of Appeals	A- 1
Opinion of the District Court	A-19
Order Denying Petition for Rehearing	A-31
Order Issuing Stay of Mandate	A-32

CITATIONS

Cases	Pages
Andrews v. Joint Clerks Port Labor Relations Com., 239 C.A.2d 285, 48 Cal.Rptr. 646 (1966)	13
Boddie v. Connecticut, 401 U.S. 371 (1970)	20, 21
Cooke v. United States, 267 U.S. 517 (1925)	19, 20, 23
Dorrough v. Estelle, 497 F.2d 1007 (5th Cir. 1974)	15
Douglas v. California, 372 U.S. 353 (1963)	11, 14
Goldberg v. Kelly, 397 U.S. 254 (1970)	20, 21
Griffin v. Illinois, 351 U.S. 12 (1956)	14, 19
Groppi v. Leslie, 404 U.S. 496 (1972)	20, 23
Harris v. United States, 382 U.S. 162 (1965)	20, 23
In re Berry, 68 Cal.2d 137, 436 P.2d 272 (1968)	13, 16, 22, 23
In re Brown, 439 F.2d 47 (3d Cir. 1971)	15
In re Green, 369 U.S. 689 (1962)	19, 20, 21, 23
In re Grossman, 24 C.A.3d 630, 101 Cal.Rptr. 176 (1972)	15
In re Henderson, 61 Cal.2d 541, 393 P.2d 685 (1964)	10
In re McConnell, 370 U.S. 230 (1962)	23
In re Oliver, 333 U.S. 257 (1948)	19, 20, 23
Johnson v. Mississippi, 403 U.S. 212 (1971)	23
Mayer v. Chicago, 404 U.S. 189 (1971)	10, 14
McKane v. Durston, 153 U.S. 684 (1894)	19
People v. Fusaro, 18 C.A.3d 887, 96 Cal. Rptr. 368 (1971)	15
Rinaldi v. Yeager, 384 U.S. 305 (1966)	14, 16
Sacher v. United States, 343 U.S. 1 (1952)	15, 22

Pages

Taylor v. Hayes, ... U.S. ....., 94 S.Ct. 2697 (1974) 19, 20, 22, 23

United States v. Alter, 482 F.2d 1016 (9th Cir. 1973) 21, 23

United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971) 14

United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970) 14

United States v. United Mine Workers, 330 U.S. 258 (1947) 22

Walker v. City of Birmingham, 388 U.S. 307 (1967) 22

Williams v. Oklahoma, 395 U.S. 458 (1969) 14

CONSTITUTIONAL PROVISIONS

United States Constitution:

Fourteenth Amendment 3, 14, 23

STATUTES

28 U.S.C. 1254(1) 2

California Code of Civil Procedure:

Section 170.6 ..... 3, 5, 13

Section 1209 ..... 2, 3, 10

Section 1211 3

Section 1222 3

California Penal Code:

Section 166 3

Section 1237 ..... 3, 10

Section 1272 ..... 3, 10

Section 1466 ..... 3, 10

RULES

Pages

Federal Rules of Criminal Procedure, Rule 42 23

California Rules of Court:

Rule 105 ..... 10, 11

Rule 183 10

Rule 190 10

OTHER AUTHORITIES

American Bar Association, Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function (March, 1970) 9, 16, 17

Chase, Appealability of Contempt Adjudication or Conviction, 333 A.L.R.3d 448 15

Chase, Contempt Adjudication or Conviction as Subject to Review Other Than By Appeal or Writ of Error, 33 A.L.R.3d 589 18

Comment, Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065 (1969) 14

Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1 (1972) 14

Jackson, The Machinery of Justice in England (5th ed. 1967) 15

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.....

EDWARD C. BELL,
Petitioner,

v.

RICHARD D. HONGISTO, Sheriff of the City and County of San Francisco, State of California,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

The petitioner Edward C. Bell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached as Appendix A hereto. The opinion of the Dis-

trict Court for the Northern District of California, reported at 346 F.Supp. 1392, is attached as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 26, 1974. A timely petition for rehearing was denied on October 2, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In California, a person summarily convicted of criminal contempt under Section 1209 of the California Code of Civil Procedure may be immediately sentenced to serve five days in jail and to pay a fine of $500. That person may not seek review of his conviction by way of appeal, nor is he entitled to bail pending appeal; instead, he is limited to filing a petition for a writ of habeas corpus and to seeking a discretionary stay of execution pending determination of his petition. If such a stay is denied, the contemnor must immediately begin—and often complete—service of his jail sentence before he is able to file a carefully prepared petition for review. The questions presented are:

1. Where all other persons convicted of a crime in California, whether denominated a felony or a misdemeanor, are entitled as of right to appellate review by way of appeal, which includes (a) a complete record of the proceedings in the trial court, (b) a full briefing of the issues, (c) oral argument, and (d) bail pending appeal, is it an equal protection violation to deny such rights to contemnors?

2. Where the validity of a summary contempt conviction depends entirely upon the correctness, as a matter of law, of a prior ruling by the trial judge which the con-

temnor has refused to obey, is it a due process violation to deny the contemnor an adequate amount of time in which to prepare and present to the court—at some time prior to conviction—a legal argument that the prior ruling was in fact incorrect?

3. Under the same circumstances, is it a due process violation to deny to such a contemnor one adequate opportunity to prepare and present his legal argument, if not prior to conviction, then by way of appellate review?

4. Is a person denied due process of law when the severity of a sentence summarily imposed on him for direct contempt of court is increased by reason of events which occurred outside the presence of the court and which were made known to the court through a newspaper article?

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 170.6, 1209, 1211 and 1222 of the California Code of Civil Procedure, and of Sections 166, 1237, 1272 and 1466 of the California Penal Code, are set out in the opinion of the court below at pages 3-7 of Appendix A, *infra.*

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

By denying to contemnors the right to appeal and to bail pending appeal, California has adopted a procedure

which not only invests a trial judge with the dangerous powers of summary contempt, but also permits him to effectively insulate that power from subsequent judicial scrutiny. As a result, many contemnors never receive—at any stage of these criminal proceedings—one full and fair opportunity to be heard by an impartial tribunal. Such a procedure, which frequently affects lawyers representing criminal defendants, is vividly illustrated by the following facts of the case at bar.

Petitioner Edward C. Bell, himself a black California attorney, was in January of 1972 representing three black defendants who were being tried in the San Francisco Superior Court for assaulting a white police officer.* On January 24, 1972, petitioner was advised by the Master Calendar Judge to appear at 11:30 a.m. on January 27, 1972, to argue a discovery motion which was then pending before the court. R. 2. Petitioner appeared as directed, believing the discovery motion to be the only order of business.*

The Master Calendar Judge, however, unexpectedly referred the matter to Judge Clayton Horn for trial at 1:30 that same afternoon, sending the discovery motion along with the case. R. 60-61. These proceedings terminated at about noon, whereupon petitioner—who had been practicing law for less than two years and who knew nothing about Judge Horn—returned to his office.* During the noon hour he was informed by two experienced attorneys

*Those portions of this statement of the case which are designated by an asterisk (*) are supported by uncontroverted documents which were filed as exhibits in support of petitioner's reply memorandum in the District Court. Although these documents were also part of the record in the court below, as confirmed by the index thereto, they were never reproduced and paginated by the District Court Clerk and therefore cannot be referred to in the usual manner.

that because Judge Horn was well known for holding strong anti-black and pro-police views, a peremptory disqualification of the judge pursuant to Section 170.6 of the California Code of Civil Procedure would be in his clients' interest. *Ibid.* Acting upon their advice, petitioner immediately prepared the disqualification affidavit required by Section 170.6 and returned to the chambers of the Master Calendar Judge, where he presented the affidavit at about 1:00 p.m. *Ibid.*

The judge, however, rejected the affidavit as untimely, asserting that Section 170.6 requires a peremptory challenge to be filed immediately upon the assignment of a case for trial. R. 3. Petitioner, who believed (and who still contends) that the affidavit was in fact timely under California law, proceeded to the chambers of Judge Horn, who told petitioner that if he did not immediately proceed to trial he would be held in contempt of court. R. 64. Petitioner respectfully declined to do so, based upon his belief that

> "if I proceed to trial at this time I will waive my right, my clients' right to peremptorily challenge his Honor and therefore in reference to my professional conduct as a member of the Bar I cannot proceed." R. 66.

Judge Horn then cited petitioner for contempt, sentenced him to serve 5 days in jail and to pay a fine of $500, and added the following statement;

> "The Court will stay execution until 9:30 tomorrow morning so as to give you a chance to file a writ if you so desire, but you are to present yourself in this department at 9:30 tomorrow morning to begin serving your sentence unless some other Court orders otherwise.
>
> MR. BELL: 9:30 doesn't give me much time.
>
> THE COURT: I am sorry, that is it.

MR. BELL: Well, couldn't we make it some time in the afternoon, so—

THE COURT: 9:30 tomorrow morning, Mr. Bell.

MR. BELL: Very good." R. 67.

The session was then adjourned at about 2:15 p.m., and later in the day a judgment and order of contempt was filed by Judge Horn with the Superior Court Clerk. R. 10.

Petitioner proceeded directly to his office, where he did about thirty minutes of rudimentary research.* He then dictated, while his secretary typed, a petition for a writ of habeas corpus, which was composed, typed, xeroxed, and assembled in approximately forty-five minutes, and did not contian a citation to a single legal authority. *Ibid.* This petition was presented by petitioner to a deputy clerk of the California Court of Appeal at approximately 4:15 p.m., and a verbal order denying the petition was conveyed by the clerk to petitioner at about 4:25 p.m. *Ibid.* Later in the afternoon a written order denying the petition without opinion was issued by the court. R. 11.

Between 5:00 p.m. on January 27 and 3:00 a.m. on January 28, petitioner drafted another petition for a writ of habeas corpus, which was filed in the California Supreme Court at 9:00 a.m. on January 28, and denied by that court sometime prior to 1:00 p.m. on the same day.* Shortly *after* this petition was filed, Judge Horn extended the stay of execution of petitioner's sentence until February 1, 1972, and returned the underlying criminal prosecution to the Master Calendar Judge so that it could be assigned out to another judge. *Ibid.*

During the following weekend (January 29-30, 1972), attorneys for petitioner prepared a third habeas petition which was filed in the California Supreme Court on January 31, 1972. R. 5. At 9:30 a.m. on February 1, 1972,

petitioner appeared before Judge Horn, at which time he was immediately taken into custody, handcuffed, and transported to the county jail.* At that point, petitioner's attorney apprised Judge Horn of the second filing in the California Supreme Court and requested a further stay of execution until the court had acted on the petition. R. 70-71.

After Judge Horn stated that he intended to deny petitioner's request for an additional stay, the president of the California Criminal Trial Lawyers of Northern California addressed the court and expressly disassociated himself from certain remarks, critical of Judge Horn, "such as are in the press this morning." R. 71. Judge Horn replied that "some of them were attributable to Mr. Bell, also. It looks like he wants to try his case in the newspapers." *Ibid.* And when petitioner's attorney again asked Judge Horn to extend the stay, the following colloquy ensued:

> "THE COURT: Mr. Brotsky, when your client, and I assume Mr. Bell is your client—
> Mr. BROTSKY: He is, your Honor.
> THE COURT: —makes such charges as are related to him in this morning's newspaper, let the Supreme Court decide it. I'm not going to give you any further consideration." R. 72.

The proceedings were then adjourned. Later in the day Judge Horn, *sua sponte,* issued and filed in the Superior Court an "Order re Work Furlough," in which it is "ORDERED THAT said Edward C. Bell not be granted work furlough." R. 33. The next day, February 2, 1972, the California Supreme Court denied petitioner's second petition for a writ of habeas corpus. R. 7. The order of denial cited two cases, one of which holds that the court will not consider successive petitions on the same issue. See R. 165.

Having thus exhausted his state remedies, petitioner filed a habeas corpus petition in the United States District Court for the Northern District of California, which temporarily released him from custody after he had served approximately two and one-half days of his jail term. R. 26-27. After full briefing and argument, the District Court issued an order granting the petition for a writ of habeas corpus, holding that it is a violation of the Equal Protection Clause for California to deny to persons convicted of criminal contempt the right to an appeal and to bail pending appeal, when all other misdemeanants in California are afforded these rights as a matter of law. Appendix B, *infra*. Having thus ruled in petitioner's favor on equal protection grounds, the District Court did not reach the due process arguments which petitioner had also advanced, and which had been fully briefed and argued to the District Court. *Ibid.*

The United States Court of Appeals for the Ninth Circuit reversed. Appendix A, *infra*. In so doing, it stated that petitioner "had the execution of his sentence stayed for five days while he prepared and filed petitions for review." *Id.* at 12. The court indicated that the right to an appeal is not a "fundamental" right for equal protection purposes, but that even if it were "we do not believe that this right or interest was significantly impaired in the instant case." *Id.* at 11. The court also held that the denial of an appeal to contemnors was rationally related to a legitimate state purpose, and that petitioner "lacked standing" to raise the issue of denial of bail pending appeal. *Id.* at 15. The court also rejected, out of hand, petitioner's due process arguments. *Id.* at 16.

Petitioner's timely petition for rehearing and suggestion of appropriateness of rehearing *in banc* was denied by the

court below on October 2, 1974. A copy of that order is attached as Appendix C hereto. The court also issued a stay of mandate, a copy of which is attached as Appendix D hereto, pending the determination by this Court of the instant petition for certiorari.

REASONS FOR GRANTING THE WRIT

In recent years this Court has often acted to narrow the area of summary contempt, and to insure that this unique power, traditionally disfavored because of its obvious potential for abuse, is surrounded by adequate procedural safeguards. This case is important because it squarely challenges what may well be the last remaining bastion of unfettered judicial discretion: the ability of a trial judge to summarily convict for contempt and thereafter insulate that conviction from any meaningful appellate review. It is also important because it presents a recurring situation as to which this Court has yet to render a definitive opinion, namely, the due process which must be afforded an alleged contemnor who has a substantial legal defense which he needs time to adequately prepare.

But what is at stake in this case is not just fundamental fairness to contemnors—important as that interest clearly is. For here, as is so often the case, the contemnor was a defense attorney, whose duty it was to protect his clients' interests "even at the expense of his own * * * so that the adversary process may operate."[1] Therefore the very real harm caused by the California system reaches beyond the attorney/contemnor, upon whom it initially falls, to jeopardize not only the rights of criminal defendants but, in the end, the adversary system itself.

---

1. American Bar Association, Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function (March, 1970) at 149 [hereinafter referred to as ABA STANDARDS].

I. It Is Important That this Court Determine Whether the Denial, to an Attorney Who Was Summarily Convicted of Contempt While Representing Criminal Defendants, of an Appeal and of Bail Pending Appeal, Rights Available to All Other Criminal Defendants in California, Violates His Right to Equal Protection and Their Right to Competent and Vigorous Legal Representation.

In California, all criminal defendants—including misdemeanants—have an absolute right to an appeal and to bail pending appeal. California Penal Code, §§ 1237, 1272, 1466. See App. A., *infra,* pp. 4-8. Under the California Rules of Court, appellate review of a misdemeanor conviction[2] is based upon (1) a full record prepared by the trial court, *id.,* Rule 183; (2) full briefs, which are filed only after the record has been docketed, *id.,* Rule 105; and (3) oral argument before the appellate department of the superior court, *id,* Rule 190. If the appellant is indigent, he has the right to be furnished with an adequate record of the proceedings below, see *Mayer v. Chicago,* 404 U.S. 189 (1971), and the right to be represented by appointed counsel, see *In re Henderson,* 61 Cal.2d 541, 393 P.2d 685 (1964).

There is, however, one exception: persons convicted of criminal contempt under Section 1209 of the California Code of Civil Procedure are not entitled to an appeal or to bail pending appeal.[3] See App. A, *infra,* pp. 4-8. Instead, they must seek appellate review by filing a petition for a writ of habeas corpus and, in connection therewith, an

2. Since the penalties which may be imposed for violation of California Code of Civil Procedure § 1209 are most like those prescribed for a typical misdemeanor, the appeal procedure described in this petition for certiorari will be the one which governs the appeal of misdemeanor convictions in California.

3. The court below rejected respondent's contention that Section 1209 contempt is not criminal in nature, acknowledging that the sanction is punitive rather than compensatory or coercive. App. A, *infra,* p. 9.

application for a discretionary stay of execution of the sentence. *Ibid.* Under this procedure, there is no requirement that a record be prepared, that oral argument be held, or that counsel be appointed to represent one who is indigent. And, whenever a stay is denied, contemnors are "as a practical matter forced to file their petitions within days or even hours if they wish to avoid incarceration." App. A, *infra*, p. 12. Thus it is obvious that the two procedures differ markedly, and that seeking review by way of habeas corpus is vastly inferior to proceeding by way of appeal.[4]

It is difficult to imagine a more vivid illustration of the detriment suffered by a person seeking appellate review of a contempt citation than the one furnished by the case at bar. Had petitioner been permitted to take an appeal, he would have had 15 days after the record was prepared in which to file his opening brief, California Rules of Court, Rule 105, and would have had bail set pending the appeal. As a contemnor, however, he had no such rights, and the trial judge refused to stay execution of his sentence beyond 9:30 the next morning, making it clear that petitioner

4. For this reason it is immaterial whether, as the court below concluded, "the scope of review by petition is practically as broad as the scope of review by appeal." App. A, *infra*, p. 8. The court also placed considerable reliance upon the unsupported assumptions that "[c]ontempt cases *generally* present fewer and and simpler questions for review than ordinary criminal cases," and that a contemning court "will generally stay the execution long enough for the contemnor adequately to prepare the relatively simple petition." *Id.* at 12 (emphasis added). (Curiously, the court never once referred to the substantial issues which were in fact involved in petitioner's case, although they were extensively briefed in the record (R. 144-63)). But even putting to one side the dubious validity of the court's assumptions, it was precisely this type of judicial discretion to withhold vital appellate rights where an appeal was perceived to be without merit that was struck down by this Court as violative of equal protection in *Douglas v. California*, 372 U.S. 353 (1963).

would have "to begin serving your sentence unless some other Court orders otherwise." R. 67. Understandably, petitioner sought to avoid incarceration by preparing, in about an hour, a short petition which was presented to the court of appeal at 4:15 p.m. and denied ten minutes later. Working then into the night, he completed at about 3:00 a.m. a second petition, which was presented to the California Supreme Court at 9:00 a.m. the next morning and denied by that court less than four hours later. Only *after* he had filed this second petition did the trial judge extend the stay for four more days, but by then of course the damage had already been done.[5]

Nor can it be said that the harm to petitioner was slight, inasmuch as he had a substantial legal defense to the contempt conviction which could have been prepared only after considerable research and drafting. That argument, which was fully briefed in the District Court and is contained in the record (R. 144-63), shows that the timeliness *vel non* of petitioner's disqualification motion presents a serious question of first impression under California law. Consequently, it was necessary for counsel, among other things, to identify the basic policy reasons underlying the

---

5. Thus it is at best misleading to say, as the court below did, that petitioner had his sentence stayed for *five days* while he "prepared and filed" petitions for review. Certainly he was entitled to take at face value the trial judge's initial ultimatum that he would go to jail the next morning at 9:30 "unless some other Court orders otherwise." R. 67. Nor did petitioner's third petition, filed in the California Supreme Court, cure the harm suffered by having to prepare his first two petitions in 20 hours. This third petition, which was also prepared in great haste, did not adequately develop either the state law argument, that the conviction was invalid (see R. 144-63), or the constitutional arguments which were presented to the courts below. Moreover, in denying the third petition without opinion, the California Supreme Court cited a case which holds that the court will not consider successive petitions raising the same issues, thereby suggesting that it gave the third petition little or no consideration.

timeliness requirements of CCP § 170.6 and to show that all were consistent with petitioner's interpretation of the section.[6] On the other hand, it is well settled in California that if petitioner's disqualification motion *was* timely filed, then (1) the trial judge was without jurisdiction to order him to proceed to trial, or to find him in contempt of court,[7] and (2) such an order, if disobeyed, cannot support a contempt judgment.[8]

Yet the court below never once mentioned the fact that petitioner had a substantial defense which he had no time to prepare. Instead, it badly misrepresented the record by stating that petitioner "had the execution of sentence stayed *for five days* while he prepared and filed petitions for review," and by concluding that petitioner had made "no showing that his [first] petition on its face displayed

---

6. The record also contains testimony by two California attorneys that on other occasions Superior Court judges had accepted as timely disqualification petition filed with as much or more delay as petitioner's. Indeed Judge Horn himself acknowledged that on one occasion he had accepted just such a petition. See R. 149. Pages 144-63 of the record, containing petitioner's timeliness argument, have been certified by the Clerk of the court below and filed in this Court.

7. Where a statutory disqualifiation motion has been timely filed, "the judge against whom the peremptory challenge has been directed is without jurisdiction to proceed with the trial or hearing [citation omitted] and if he does so, all of his subsequent actions thereon, including all orders and judgment entered by him, are null and void." *Andrews v. Joint Clerks Port Labor Relations Com.*, 239 C.A.2d 285, 48 Cal.Rptr. 646, 651 (1966).

8. "[S]uch a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such order constitutes no punishable wrong." *In re Berry*, 68 Cal.2d 137, 436 P.2d 273, 281 (1968). The *Berry* opinion, as well as other cases cited by petitioner in the courts below, makes it clear that an order is "in excess of jurisdiction" if it violates a statutory provision.

sufficient merit to warrant longer deliberation [than ten minutes]." App. A, *infra*, pp. 12, 13 (emphasis supplied). But that statement entirely misses the point: that by having to prepare his first petition in one hour (rather than five days) petitioner was necessarily unable to prepare a petition which would "on its face" disclose the substantial issues which are in fact involved.

This Court has held that once a state establishes a right to appeal (as all states have in fact done), it cannot be withheld from some defendants on grounds which violate the Equal Protection Clause of the Fourteenth Amendment. *Griffin v. Illinois*, 351 U.S. 12 (1956). Once a state has established avenues of appellate review, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). Moreover, it is our view that the right to one meaningful appellate review of a criminal conviction, and to bail pending appeal, is so crucial as to be "fundamental" for equal protection purposes.[9]

---

9. While this Court appears not to have ruled on this question, it is clear that appeal has become an integral and crucially important part of the criminal justice system in America. *Cf. Griffin v. Illinois, supra*, 351 U.S. at 18-19 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Williams v. Oklahoma*, 395 U.S. 458 (1969); *Mayer v. Chicago, supra*. Although *Douglas* and its progeny involve the rights of indigents, they have been cited for the proposition that "[i]nterests which have been identified as fundamental and therefore deserving of special treatment under the Equal Protection Clause include • • • rights with respect to criminal procedure." *Comment, Developments in the Law—Equal Protection*, 82 Harv.L.Rev. 1065, 1127 (1969); *accord:* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 9, 15 (1972). See also *United States v. Thoresen*, 428 F.2d 654, 658 (9th Cir. 1970) (right to a criminal appeal is fundamental for equal protection purposes) (dictum); *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971) (right to bail pending appeal is fundamental for equal protection purposes). Surely it would be difficult to the point of impossible to show that

However, even if they are not so considered the denial of these rights to contemnors, alone among all criminal defendants in California, is not "rationally related" to any legitimate state interest within the meaning of the Equal Protection Clause. As the court below acknowledged, it is not enough for the denial of these rights to logically promote some such interest if, at the same time, it tends "to impair other, more important goals." App. A, *infra*, p. 13-14, n. 12. Yet the California scheme does exactly that: in furthering a vague, attenuated and probably illusory goal,[10] the denial of appeals to contemnors imposes serious harm to other important interests, and does so in a positively *irrational* manner.[11]

First, the California scheme withholds an appeal from the *only* type of defendant who, like petitioner, is routinely denied *all* procedural safeguards at the time his conviction was imposed, *viz.* the person summarily convicted of contempt by the very judge contemned. Such a defendant obvi-

---

the denial of an appeal to contemnors is necessary to promote a compelling state interest, since in England (see Jackson, *The Machinery of Justice in England* (5th ed. 1967) 258-60), in the Federal courts (see, e.g., *Sacher v. United States*, 343 U.S. 1 (1952)), and in many states (see Chase, *Appealability of Contempt Adjudication or Conviction*, 33 ALR 3d 448), full appeals are allowed in contempt cases as in all other criminal matters.

10. The court below identified, as the sole reason for denying appeals to contemnors, "the preservation of order and administrative regularity." App. A, *infra*, p. 14. However, where as here an attorney is held in contempt, the usual procedure in California is to defer adjudication and punishment until the end of the trial. *In re Grossman*, 24 C.A.3d 630, 101 Cal.Rptr. 176 (1972); *People v. Fusaro*, 18 C.A.3d 887, 96 Cal.Rptr. 368 (1971). Hence speed in imposing and executing punishment for contempt committed by attorneys is usually unnecessary.

11. In similar situations, at least two circuits have struck down, as violative of equal protection, state procedures which withheld appeals from certain types of defendants. See *Dorrough v. Estelle*, 497 F.2d 1007 (5th Cir. 1974); *In re Brown*, 439 F.2d 47 (3d Cir. 1971).

ously needs one meaningful appellate review by an impartial tribunal far more—not less—than other criminal defendants. *Second,* the California scheme denies an appeal to contemnors even though the law of California, unlike that of other jurisdictions, permits a contempt citation to be set aside if, on review, it is determined that the order which the contemnor disobeyed was invalid. See *In re Berry, supra,* note 8. *Third,* the California scheme is over-inclusive by denying appeals not only to those convicted of direct contempt—who may be punished summarily and as to whom a speedy prosecution is arguably important—but also to those who are convicted of *indirect* contempt and therefore may be convicted only after a full trial attended by all due process safeguards. *Cf. Rinaldi v. Yeager, supra,* striking down, as violative of the Equal Protection Clause, just such an over-inclusive classification with respect to criminal appeals.

But in our view there are even more substantial values at stake, for where as here the contempt is that of an attorney suffered in the course of defending an accused, the interests of his clients cannot be ignored.

> "A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate. And, since the accused may well be the most despised of persons, this burden rests more heavily upon the defense lawyer." ABA STANDARDS, *supra* note 1, at 146.

Indeed, this burden may well rest most heavily upon a California attorney, since in that jurisdiction an attorney may lawfully disobey an invalid court order if "the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril." *In re Berry, supra,* 436 P.2d at 281.

The duty of vigorous representation, however, necessarily brings an attorney into occasional conflict with the presiding judge.

> "The protection of his client's rights may require that the lawyer resist the wishes of the judge on some matters, and though his resistance should never lead him to act disrespectfully, it may require him to appear unyielding and uncooperative at times. In so doing, he does not contradict his duty to the administration of justice but fulfills his function within the adversary system." ABA STANDARDS at 173.

For this reason, it is essential that a criminal defense lawyer—charged as he is with the duty of vigorous representation, even in the face of judicial disfavor—is not at the same time subject to unreviewable contempt convictions which can be summarily imposed at a moment's notice by an angry, vindictive or petulant judge.

To be sure, there are reported cases in which a stay was granted, and a full review of the contempt conviction afforded by an appellate court. It is our submission, however, that these cases represent the tip of the iceberg if viewed in terms of how many attorneys, on a day-in, day-out basis, are actually faced with the immediate possibility of summary contempt. Thus we believe that a much larger number of cases lie immediately below the waterline of visibility, *i.e.* cases such as the one at bar where a contempt conviction was never given any meaningful review.

Even in such cases, however, the attorney has at least asserted his client's rights, albeit at the expense of his own. But what of those cases which in all likelihood comprise the bulk of the iceberg, in which a timorous (or perhaps only prudent) attorney—well aware of the propensity of a particular judge to immediately impose and execute a

conviction for summary contempt—simply fails to assert an unpopular position which he believes to have merit? The obvious damage to his client's rights is compounded by the invisibility of the event, and is compounded further by the likelihood that it is precisely those judges whose contempt convictions are most unjust who will also deny the stays of execution which would, as a practical matter, subject their decisions to appellate scrutiny.[12]

No attorney should have to choose between vigorous advocacy—resulting in a summary and unreviewable jail sentence for contempt—and tame acquiescence before even manifestly erroneous judicial behavior. Nor is this dilemma limited to California attorneys and litigants, since many other states also deny contemnors the right to appeal, and instead require them to proceed by some less advantageous procedure. See Chase, *Contempt Adjudication or Conviction as Subject to Review Other Than by Appeal or Writ of Error,* 33 ALR 3d 589.

Finally, it is our submission that plenary consideration of this case would serve other vital interests. First, it would enable this Court to determine whether, for equal protection purposes, rights relating to criminal appeals are "fundamental" or whether, as the court below held, they may be abridged on a showing that their restriction is rationally related to a legitimate state purpose. Second, it would enable this Court to consider whether it is a due process violation to deny an appeal to a person who has

12. The court below failed to discuss these considerations, but instead upheld the statutory scheme precisely because "it increases the deterrent value of the punishment, for a conclusive, non-appealable judgment of conviction is assuredly a more frightening prospect for the would-be contemnor than a judgment whose sting is mitigated by the delay of time-eating appeals." App. A, *infra,* p. 14.

been summarily convicted of contempt.[13] And third, it would permit an examination of whether the various rights of contemnors, many of which have recently been announced by this Court, can as a practical matter exist in a system which does not afford meaningful appellate review.

II. The Decision Below, which Permits Conviction and Punishment for Contempt Without Ever Affording the Contemnor One Full and Fair Hearing, Conflicts with Many Due Process Principles Announced by this Court and with the Decisions of this Court in In Re Green, 369 U.S. 689 (1962) and Taylor v. Hayes, ...U.S.....,94 S.Ct. 2697 (1974).

In contempt cases, as in all criminal prosecutions, the Due Process Clause of the Fourteenth Amendment forbids the imposition of a conviction and punishment unless the defendant is afforded adequate notice and an opportunity to be heard in his defense. See *e.g., Taylor v. Hayes,* ..... U.S. ....., 94 S.Ct. 2697 (1974); *In re Green,* 369 U.S. 689 (1962); *In re Oliver,* 333 U.S. 257 (1948). Although the power to punish direct contempt summarily has long been recognized, it has always been limited to cases of misconduct in open court which disturb the court's business, where immediate punishment is essential to prevent "demoralization of the court's authority before the public." See *In re Oliver, supra,* 333 U.S. at 275; *Cooke v. United States,* 267 U.S. 517 (1925).

In the case at bar, however, the allegedly contemptuous conduct occurred in chambers before the trial started; and upon its occurrence, the trial judge promptly transferred

13. To be sure, it has often been said that there is no constitutional right to an appeal. See, e.g., *Griffin v. Illinois,* 351 U.S. 12 (1956); *McKane v. Durston,* 153 U.S. 684 (1894). Yet it is unlikely that any case has so held with respect to a defendant who, at trial, was deprived of *all* due process safeguards and was instead immediately and summarily punished by the very judge whom he had contemned.

the criminal case in which it occurred back to the Master Calendar Judge for resetting. Hence, "swiftness was not a prerequisite of justice here," *Harris v. United States*, 382 U.S. 162, 164 (1965), and "[s]ince the petitioner's alleged misconduct all occurred in secret there could be no possibility of a demoralization of the court's authority before the public." *In re Oliver, supra,* 333 U.S. at 276; *accord*: *In re Green,* 369 U.S. 689 (1962). In short, there was no need to proceed summarily, and where such a need is absent a contemnor must be given a full hearing prior to the imposition of a contempt conviction. *In re Oliver, supra*; *Cooke v. United States, supra.*

There is, however, a more fundamental due process violation involved in this case. For regardless of whether a contempt is direct or indirect, a valid conviction may not be imposed until the alleged contemnor has received at least one *meaningful* hearing on the charges. *Taylor v. Hayes, supra; cf. Boddie v. Connecticut,* 401 U.S. 371, 379 (1970). The contours of such a hearing are by no means certain, since this Court "has often recognized that the requirements of due process cannot be ascertained through mechanical application of a formula." *Groppi v. Leslie,* 404 U.S. 496, 500 (1972). Yet it is well settled that in order to pass constitutional muster a hearing must at least be held "at a meaningful time and in a meaningful manner," *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970), and must be "appropriate to the nature of the case." *Boddie v. Connecticut, supra,* 401 U.S. at 378. Therefore in determining which due process safeguards are required in contempt cases it is essential to focus on the nature of the allegedly contemptuous behavior and, in particular, the defense asserted by the contemnor.

In the case at bar, petitioner did not deny having committed the act for which he was convicted. Instead, his

sole defense to the contempt charge was that his disqualification motion was timely filed; that the trial judge was therefore without jurisdiction to order him to proceed to trial; and that such an order, under California law, cannot support a contempt judgment. This purely legal defense, which involves a question of first impression in California, could have been asserted by petitioner only if he had been given sufficient time to prepare and present to the trial court the substantial legal argument which is fully developed at pages 144-163 of the record in the court below. Therefore the trial court's immediate and summary imposition of a contempt conviction cannot be squared with this Court's teaching that a hearing must be held "in a meaningful manner," *Goldberg v. Kelly, supra,* 397 U.S. at 267, or that it be "appropriate to the nature of the case," *Boddie v. Connecticut, supra,* 401 U.S. at 378.

Nor can such a result be squared with the holding of this Court in *In re Green,* 369 U. S. 689 (1962). In *Green,* an attorney advised his clients to disobey a court order which he believed to be invalid because issued in excess of the court's jurisdiction; and when they did so, both attorney and clients were held in contempt of court. This Court reversed, on the ground that "it violates the due process requirements of the Fourteenth Amendment to convict a person of a contempt of this nature without a hearing and an opportunity to establish that the state court was acting in a field reserved exclusively by Congress for the federal agency." *Id.* at 693. Thus *Green* stands for the proposition that where the legality *vel non* of an allegedly contemptuous act turns upon a complex question of law, a conviction may not be imposed until after a hearing has been held to determine the underlying legal issue. *See also United States v. Alter,* 482 F.2d 1016, 1023 n.11 (9th Cir. 1973).

But there is a final dimension to petitioner's conviction which underscores his need for "more of a hearing and notice than he received prior to final conviction and punishment." *Taylor v. Hayes, supra,* 94 S.Ct. at 2702. Ordinarily, any legal error committed by the contemned judge may, in due course, be corrected on appeal, so that a defendant cannot be convicted "merely by the impulse of one lone and hostile judge." *Sacher vs. United States,* 343 U. S. 1, 13 (1952). Here, however, petitioner was deprived not only of a hearing prior to the adjudication of contempt, but of an appeal as well. Such a deprivation might not be harmful in those jurisdictions where a person is required to obey even an invalid court order upon pain of contempt. See, *e.g., United States v. United Mine Workers,* 330 U.S. 258 (1947); *Walker v City of Birmingham,* 388 U.S. 307 (1967). But where, as in California, a contempt citation must be set aside if the underlying order which the contemnor disobeyed is incorrect, *In re Berry, supra,* note 8, it is manifestly and seriously prejudicial to foreclose a defendant from showing the incorrectness of that order at some time before punishment is imposed.

Thus petitioner was summarily convicted of contempt even though (i) there was no need for such peremptory action; (ii) there was an urgent need for sufficient time in which to prepare and present petitioner's legal defense; (iii) the conviction was not adequately reviewed on appeal; and (iv) the severity of petitioner's sentence was increased by virtue of events which occurred outside the presence of the court.[14] In combination, these facts plainly show a

14. Although not emphasized herein, petitioner does not relinquish his contention, raised in the courts below, that events which occurred outside the courtroom were obviously taken into consideration by the trial judge in denying petitioner a further stay of execution pending decision by the California Supreme Court (R.

violation of that fundamental fairness which lies at the heart of the Fourteenth Amendment.

During the past decade, this Court has decided cases involving a variety of situations in which the summary contempt power has been exercised. Yet except for its relatively brief opinion in *In re Green, supra,* this Court has never furnished guidance to the lower courts with respect to those summary contempts in which the alleged contemnor has a substantial legal defense which requires sufficient time to prepare. As may be seen from the case at bar, and from cases such as *In re Green, supra, United States v. Alter, supra,* and *In re Berry, supra,* this issue is a significant one which can arise in many different contexts, and can arise under the Fourteenth Amendment (as in *Green*) or under Rule 42 of the Federal Rules of Criminal Procedure (as in *Alter*). Therefore a definitive statement on this issue—as well as on the question of the right of a contemnor to an appeal—would go far to complete the tapestry of contempt law which is of such crucial importance to the continued existence of a "vigorous, independent bar." *In re McConnell,* 370 U.S. 230, 236 (1962).

71-72) and in increasing the severity of petitioner's sentence by gratuitously denying him the right to participate in the work furlough program. R. 33. However, it is well settled that a defendant's right to due process does not permit the imposition of summary contempt for acts which happen outside the courtroom, *Johnson v. Mississippi,* 403 U.S. 212 (1971); *In re Oliver, supra,* and that the opportunity to present evidence as to the sentence only is an important part of that right. See *Taylor v. Hayes, supra; Groppi v. Leslie, supra; Cooke v. United States, supra; Harris v. United States, supra; In re Oliver, supra.* Where as here the sentence is limited to five days, the grant or denial of a stay of execution pending judicial review of the conviction, and of the right to participate in work furlough, assume considerable importance. Therefore this case involves significant aspects of indirect contempt which, under the decision of this Court, may not be punished summarily.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

B. E. BERGESEN, III
693 Mission St., 2nd Floor
San Francisco, CA 94105
(415) 495-6420

BENJAMIN DREYFUS
ALLAN BROTSKY
1256 Market Street
San Francisco, CA 94105
(415) 864-3131
Attorneys for Petitioner

October 21, 1974

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 72-2797

EDWARD C. BELL,
Petitioner-Appellee,

vs.

RICHARD D. HONGISTO,
Respondent-Appellant.

[July 26, 1974]

Appeal from the United States District Court
Northern District of California

OPINION

Before: CHAMBERS, CARTER and WALLACE, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

Richard D. Hongisto, the Sheriff of San Francisco, appeals from the order of the district court granting a writ of habeas corpus to the petitioner Edward Bell. Bell, an attorney, had been summarily convicted of direct contempt of the San Francisco Superior Court and was sentenced to five days in jail and a $500 fine. After exhausting his state remedies he brought this petition.

We are faced with three issues, each of constitutional dimension: (1) Does § 1222 of the California Code of Civil Procedure, which denied Bell the *right to appeal* his contempt conviction, thereby violate the equal protection clause of the United States Constitution? (2) Does § 1222, Code

Civ. P., which denied Bell *the right to bail* pending review of his conviction by petition for certiorari or habeas corpus, thereby violate the equal protection clause? (3) Does § 1211 of the California Code of Civil Procedure, which permits a *summary punishment* of those persons who commit contempt in the immediate presence of the court, violate the due process clause of the United States Constitution under the circumstances of this case?

The district court answered the first two of these questions affirmatively, and ordered Bell's release without reaching the question of due process. We reverse. While we express no opinion on the wisdom of § 1222, Code Civ. P., we cannot hold it in violation of the equal protection clause. We are thus confronted with the due process question which the district court avoided; and the record developed below is sufficient to satisfy us that § 1211, Code Civ. P., as applied to the facts in this case, has no constitutional infirmity.

The Facts

On January 27, 1972, at 11:30 a.m., attorney Edward Bell appeared on behalf of three criminal defendants before the Master Criminal Calendar Judge of the San Francisco Superior Court. The Master Criminal Calendar Judge proceeded to assign the case to a trial judge. Bell was told to appear before that trial judge in two hours, that is, at 1:30 p.m. of the same day.

During the noon recess, Bell went to his office and telephoned two other attorneys for advice regarding the assigned trial judge. They informed Bell that the assigned judge was prejudiced in crusial [sic] ways.

During the remainder of the noon recess, Bell prepared a motion and affidavit to disqualify the trial judge peremp-

torily under § 170.6, Code Civ. P.[1] At 12:55 p.m. Bell presented the motion to the Master Criminal Calendar Judge, who denied it on the ground of untimeliness, stating that according to his reading of § 170.6 Code Civ. P., a disqualification motion must be filed at the time a trial judge is assigned. Bell's motion was therefore one hour and twenty minutes too late.

At 1:30 p.m. of that day, Bell appeared as scheduled and renewed the disqualification motion before the trial judge himself, who also denied the motion as untimely, telling Bell to proceed to trial. Bell declined on the ground that, by going to trial, he might be waiving his right to appeal the denial of the disqualification motion.

The trial judge then announced, ". . . Mr. Bell, I order you to proceed with the trial of this case forthwith. And, what is your reply to that?" Bell replied, "I refuse to go to trial, your Honor." Thereupon the trial judge found Bell in direct

---

1. § 170.6, California Code of Civil Procedure.

"(1) No judge or court commissioner of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge or court commissioner before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner.

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge or court commissioner to try the cause or hear the matter. . . ."

contempt of court and sentenced him to five days in jail and a $500 fine.

Under California law, Bell had no right to *appeal* this judgment of contempt, but he did have the right to *petition* the higher state courts for a writ of habeas corpus or a writ of certiorari. In order to allow Bell time to file such petitions, the trial judge stayed execution of the sentence until 9:30 a.m. of the following day (the 28th of January) and later extended the stay for four additional days (until February 1).

Bell quickly filed two petitions for review, one with the California Court of Appeals and, later, one with the California Supreme Court. Both petitions were denied. Bell went to jail on February 1, 1972. Subsequently, an additional petition in the California Supreme Court was denied on February 2, 1972.

On February 3, Bell filed a petition for a writ of habeas corpus in the federal district court. The district court ordered his release from custody on grounds that § 1222, Code Civ. P., violated the equal protection clause.

The California Statutory Scheme

Sections 1237[2] and 1466[3] of the California Penal Code provide that the defendants in "criminal" cases have the right to appeal from a conviction.

---

2. § 1237, California Penal Code.
"An appeal may be taken by the defendant:
1. From a final judgment of conviction except as provided in Section 1237.5.
2. From any order made after judgment, affecting the substantial rights of the party."

3. § 1466, California Penal Code.
"An appeal may be taken [by the defendant] from a judgment or order of an inferior court, in a criminal case, to the superior court of the county in which such inferior court is located, in the following cases. . . .
(a) From a final judgment of conviction. . . .
(b) From any order made after judgment affecting his substantial rights."

Section 1272[4] of the Penal Code provides that convicted defendants may be released on bail pending appeal.

Section 166[5] of the penal Code provides that every person guilty of eight specified types of contempt, which are labelled "criminal contempt," is guilty of a "misdemeanor."

---

4. § 1272, California Penal Code.
"When admitted to Bail after conviction and upon appeal. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:
1. As a matter of right, when the appeal is from a judgment imposing a fine only.
2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.
3. As a matter of discretion in all other cases."

5. § 166, California Penal Code.
"Criminal Contempts. Every person guilty of any contempt of Court of either of the following kinds, is guilty of a misdemeanor:
1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any Court of justice, in immediate view and presence of the Court, and directly tending to interrupt its proceedings to impair the respect due to its authority;
2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any Court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;
3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any Court;
4. Willful disobedience of any process or order lawfully issued by any Court;
5. Resistance willfully offered by any person to the lawful order or process of any Court;
6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question;
7. The publication of a false or grossly inaccurate report of the proceedings of any Court;
8. Presenting to any Court having power to pass sentence upon any prisoner under conviction, or to any member of such Court, any affidavit or testimony or representation of

Section 1209[6] of the Code Civ. P. lists eleven types of "contempts of the authority of the court." Contempt pro-

---

any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this Code."

6. § 1209, California Civil Procedure Code.

"The following acts or omissions in respect to a court of justice or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceedings;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

ceedings brought under this section, as distinguished from § 166, Penal Code, are not "criminal" proceedings, *as a matter of terminology*, although they are criminal in character. *Pacific Tel. & Tel. Co. v. Superior Court for Los Angeles County*, 265 C.A. 2d 370 (1968).

Section 1211[7] of the Code Civ. P. provides that a contempt committed in the immediate view and presence of the court may be punished summarily.

Section 1222[8] of the Code Civ. P. provides that the judgment of the court in contempt cases is final and conclusive. This section, despite its broad language, does not apply to contemnors labelled "criminal" under the Penal Code, § 166. *In re Buckley*, 10 Cal. 3d 237 (1973).

But it is clear that Bell does not belong to that class of contemnors labelled "criminal" under the Penal Code.[9] Hence § 1222, Code Civ. P., *does apply* to him.

---

7. § 1211, California Civil Procedure Code.
"When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.
When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers."

8. § 1222, California Civil Procedure Code.
"The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive."

9. The state court did not specify under what statute Bell was convicted, but an examination of the case shows that it could *not* have been § 166, P.C. A " 'violation of section 166 of the Penal Code is a misdemeanor and as such it is to be prosecuted in the same manner as other misdemeanors' rather than under the Code of Civil Procedure for summary contempts." *In re McKinney*, 70 C.2d 8, 14

Section 1222, Code Civ. P., as noted above, has been construed by California courts to bar *appeals* but to allow *petitions* for writs of habeas corpus and certiorari. *E.g., Heller v. Heller,* 230 C.A.2d 679 (1964). These remedies limit the inquiry of the reviewing court solely to questions of the inferior court's jurisdiction. *In re Chapman,* 141 C.A.2d 387 (1956). The term "jurisdiction" covers a great deal of ground, however, for the questions of whether a petitioner's alleged acts constituted contempt, and whether the evidence was sufficient to establish those alleged acts, have been held "jurisdictional" inquiries. *In re Ciraolo,* 70 C.2d 389 (1969). Thus the scope of review by petition is practically as broad as the scope of review by appeal. *See* Comment, *Contempt: Scope of Review of Contempt Orders in California,* 37 Calif. L. R. 301 (1949).

Equal Protection

Bell contends that § 1222, Code Civ. P., violates the equal protection clause of the United States Constitution because it precludes an appeal from an order adjudicating a person in contempt of court, and precludes bail pending review by petition, while at the same time § 1237 and § 1466 of the Penal Code allow "criminal" defendants these procedural benefits. (We temper this contention with the observation that persons convicted of contempt under § 166, Penal Code, are indeed permitted to appeal and have bail.)

(1968). "[T]he superior court [has] no jurisdiction to hear and convict the petitioner of the misdemeanor of contempt of court under section 166 of the Penal Code." *McKinney, supra,* at 13.

Since the superior court punished Bell summarily, and the California Court of Appeals and the California Supreme Court found no jurisdictional error, the judgment of contempt was necessarily not under § 166, P.C.

The California Supreme Court rejected an argument identical to Bell's in *In re Buckley,* 10 Cal.3d 237 (1973). Since the contention raises a federal question, we are not bound by that state decision and are required to make an independent determination. Yet we must keep in mind that we are dealing with a state statutory scheme and the state case law interpreting and upholding it. Thus, in accordance with our principle of affording state laws a presumption of validity in order to avoid unnecessary federal interference in state affairs, *see McNabb v. United States,* 318 U.S. 332, 340 (1943), we pay deference to the views of the California Supreme Court. The discussion that follows is our own analytical journey to the same end, reached more briskly by that Court.

(a) Right to appeal

Respondent contends that Bell's argument regarding a right to equal treatment with "criminal" defendants is eviscerated by the fact that Bell was not held in "criminal" contempt. We reject the respondent's contention. It is true that Bell was convicted under §§ 1209 and 1211, Code Civ. P., not under § 166, Penal Code, and hence was not a "criminal" under the statutory terminology. But Bell's contempt was essentially "criminal" in nature, even if not "criminal" by virtue of § 166, Penal Code, because the purpose of the contempt sanction in this case was punitive rather than compensatory or coercive. *See Morelli v. Superior Court of Los Angeles County,* 1 C.3d 328 (1969); *Gompers v. Bucks Stove & Range Company,* 221 U.S. 418 (1911); *Penfield Co. of California v. Securities & Exchange Com'm,* 330 U.S. 585 (1947); *In re Nevitt* (8 Cir. 1902) 117 F. 448.

Accordingly, we consider the question whether it is constitutionally permissible to deny contemnors suffering

essentially criminal sanctions the same right of appeal afforded those defendants actually labelled "criminal."

In equal protection cases, the burden of justification that must be carried by the state is sometimes *heavy* and sometimes *light,* depending on the nature of the classification in question and the nature of the imposition which the state law places upon the encumbered class.

A *strict* standard of judicial review is invoked whenever the state law operates to the disadvantage of a "suspect class" (examples being a class based on race or alienage) or whenever the state law impairs a "fundamental interest" (such as the right to vote or to travel interstate); when such a law is challenged, it will be held unconstitutional unless the state can show it is necessary to promote a compelling state interest.[10]

On the other hand, if the law in question neither injures a "suspect class" nor impairs a "fundamental interest," it will be evaluated under the *general* standard. Under this test, the state law is valid so long as it rationally furthers a legitimate state interest.[11]

In order to choose the correct standard of review in this case, we must ascertain whether or not a fundamental interest is impaired sufficiently to invoke strict scrutiny. (No serious contention can be made that state law here injures a "suspect class.")

In this inquiry, the leading case cited by Bell is *Griffin v, Illinois,* 351 U.S. 12 (1956), which held that an indigent was entitled to a free trial transcript on appeal. *Cf. Mayer v. City of Chicago,* 404 U.S. 189 (1971). But we do not find *Griffin* or *Mayer* controlling.

---

10. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 16-17 (1973) and citations therein.

11. *Id.*

First, *Griffin* and *Mayer,* although recognizing the importance of adequate review of a criminal conviction, do not *expressly* call it a "fundamental interest," nor is it clear a strict standard of review was applied.

Secondly, assuming the Court in those cases did in fact *tacitly* find a "fundamental interest" and apply a strict standard of review, the Court did so largely because the classification in question was based on wealth. Classifications based on wealth are "traditionally disfavored." *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668 (1966). But Bell's class is not indigent.

Since Supreme Court decisions provide no authority for regarding the right to adequate appellate review as "fundamental," we look to the Constitution itself for guidance. The lesson of *San Antonio School District v. Rodriguez,* 411 U.S. 1, 33-34 (1973) is that ". . . the key to discovering whether [an interest] is 'fundamental' . . . lies in assessing whether there is a right to [that interest] explicitly or implicitly guaranteed by the Constitution." *San Antonio School District, supra.*

The Constitution, a basic text of criminal procedure, contains numerous provisions to safeguard the criminal defendant. But in all its provisions, we find no implicit, and surely no explicit, guarantee of the right to appeal. As said in *Griffin, supra,* at 18, "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."

Furthermore, even if the right to adequate review of a criminal conviction were a "fundamental interest," we do not believe that this right or interest was significantly impaired in the instant case. The cases speak loosely at times of invoking the standard of strict scrutiny whenever a fundamental interest in "involved." The facts in those cases

make clear, however, that it is actually the significant "impairment" of the fundamental interest, not merely its "involvement" that has led courts to apply the strict standard.

In the instant case, there is probably some degree of detriment imposed on Bell by § 1222, Code Civ. P., but we believe it is slight. We have considered the two ways suggested by Bell in which an appeal is more advantageous than a petition for review: (1) because misdemeanants have more time to prepare arguments to present to the reviewing court than do contemnors like Bell; and (2) because misdemeanants are assured a hearing before the reviewing court and a full consideration of their case, while contemnors like Bell often have their petitions denied summarily without a hearing.

As to (1), we note that misdemeanants have a statutory allotment of time in which to prepare appellate arguments, as provided in the California Rules of Court 105 and 182. On the other hand, contemnors under § 1209, Code Civ. P., have no fixed time limits in which to file their petitions for review. While this allows them to take as much time as they please, as a practical matter they are forced to file their petitions within days or even hours if they wish to avoid incarceration. But we doubt whether a longer period would benefit contemnors significantly. Contempt cases generally present fewer and simpler questions for review than ordinary criminal cases. The contemning court will generally stay the execution long enough for the contemnor adequately to prepare the relatively simple petition. Bell, for instance, had the execution of his sentence stayed for five days while he prepared and filed petitions for review.

As to (2), we note that the California Rules of Court seek to guarantee that each misdemeanant will have a thorough consideration given to his case by the reviewing

court. Rules 183, 190 and 106. On petitions by contemnors convicted under § 1209, Code Civ. P., no such rules are at hand to guide the judicial process.

We are not persuaded, however, that petitions for review are less adequately considered by the reviewing court than are briefs on appeal. Only if the petition can be disposed of on its face will the petitioner be denied a hearing. The petitioner with a serious claim will thus be on equal footing with a misdemeanor appellant with a serious claim.

Bell points to the fact that his first petition was denied a mere ten minutes after its filing. Yet Bell makes no showing that his petition on its face displayed sufficient merit to warrant longer deliberation. Even if the first petition was too hastily denied, any error would have been cured by consideration of the subsequent petitions. The second petition was denied four hours after its filing. This was time enough to allow for a full perusal of its contents and adequate consideration of its merits.

The mere fact that a decision is speedily forthcoming, therefore, is insufficient to raise a presumption that the reviewing court failed in its duty to consider a case thoroughly. To find a dereliction of duty we would require concrete evidence. Bell fails to adduce such evidence.

Therefore, even on the dubious assumption that the right to appeal is a "fundamental interest," we believe that the interest was not sufficiently impaired to invoke strict judicial scrutiny. We therefore shall judge the California statute under the general standard. Accordingly, § 1222, Code Civ. P., insofar as it denies the right to appeal, must be held valid so long as it rationally[12] furthers a legitimate, articulated state objective.

---

12. A statute does not "rationally" further certain goals merely because it *logically* tends to promote them. A legislature does not act "rationally" when it acts in logical furtherance of lesser goals

One objective behind § 1222, Code Civ. P., in the context of punitive sanctions, is to facilitate the preservation of order and administrative regularity. This objective is patently legitimate. We need only inquire, then, whether the California legislature had reason to believe that § 1222, Code Civ. P., would rationally further such goal.

Since contempt, unlike other criminal behavior, is a direct attack on the authority of the court and tends to thwart the processes of justice, the legislature might reasonably deem it desirable to devise special procedures to safeguard the courts. Section 1222, Code Civ. P., arguably provides this safeguard in two respects. First, it encourages the trial court to mete out necessary punishment, for a court might be reluctant to cite a person for contempt if conviction might lead to lengthy appeals which would further delay and disrupt the trial process. Second, it increases the deterrent value of the punishment, for a conclusive, non-appealable judgment of conviction is assuredly a more frightening prospect for the would-be contemnor than a judgment whose sting is mitigated by the delay of time-eating appeals.

We therefore hold that § 1222, Code Civ. P., rationally furthers a legitimate state objective and thus does not violate the equal protection clause.

---

at the gross expense of more vital goals.

Thus, to determine whether a statute is rational, the court must consider the statute's logical tendency to promote its avowed goals against its tendency to impair other, more important goals. This does not mean we shall oversee a legislature in its policy decisions, or try to impose our will in choosing among competing values. That would exceed our province. But when a legislature's choice is manifestly contrary to certain basic values inherent in a just society, we must hold that choice to be irrational.

In the instant case, we see nothing in the statute to indicate that certain values basic to a just society are being sacrificed irrationally for the sake of inferior values. Hence in this case we should hold the statute "rational" so long as it tends *logically* to further its purposed objectives.

(b) Right to bail

Section 1222, Code Civ. P., as interpreted by the California Supreme Court, has been held to mean (1) that no contemnor except one convicted under § 166, P.C., may *appeal* his conviction, and (2) that no contemnor except one convicted under § 166, P.C., is entitled to *bail* pending review of his conviction by petition.

Bell lacks standing to argue the unconstitutionality of the denial of bail rights, for although he had no right to bail, he was granted a stay of sentence, during which he petitioned both the California Court of Appeals and the California Supreme Court. The stay was an equivalent of bail.

In *Barrows v. Jackson,* 346 U.S. 249 (1953), the Supreme Court stated the familiar rule that " a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation." (at 255). A corollary of this rule is that, if a statute contains separable provisions, a person may challenge only those provisions which operate to injure him, and he may not challenge those provisions that cause him no harm.

Bell therefore cannot be heard to argue that the rule as to bail, in its application to his case, denied him equal protection of the laws. ". . . [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,* 362 U.S. 17, 21 (1960). This principle cannot be relaxed in the present case, for Bell lacks the type of relationship with other persons which might give him standing to assert their rights, and because persons adversely affected by the bail provision will be able adequately to

protect their own rights regardless of the outcome of this litigation. *See Eisenstadt v. Baird,* 405 U.S. 438 (1972).

There is another reason that the question of the right to bail is not before us. This is a habeas corpus proceeding, the ultimate purpose of which is to secure the petitioner's release from unlawful custody. Bell could raise the bail question only if an improper denial of bail was the cause of his custody at the time of the instant petition. At the time Bell commenced this habeas corpus proceeding, however, the review of his contempt conviction had been completed within the state courts and, therefore, even if he was constitutionally entitled to bail pending state court review, that time had expired when this habeas corpus proceeding began. No relief can be afforded in this habeas corpus proceeding for the allegedly improper denial of bail, for the denial of bail was not the cause of Bell's custody at the time petition herein was filed.

Due Process

Bell contends it was fundamentally unfair for the trial judge to find him in contempt summarily under § 1211, Code Civ. P. Of his various arguments in support of this contention, the majority are frivolous, but two warrant a short discussion. First, he argues that the trial judge was personally embroiled with him and thus should have been disqualified from adjudging him in contempt. Secondly, he argues that the conviction was so erroneous as a matter of state law that it denied him due process.

When a judge becomes so "personally embroiled" with a lawyer that he is unable to sit impartially in judgment on the contempt charge, due process requires that he must be disqualified. *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971). But on the facts of this case, we are far from persuaded that the trial judge was "personally embroiled" with

Bell. Bell's conduct did not vility [sic] the judge. To the contrary, Bell was polite throughout. And the judge's comments on record do not demonstrate a bias or anger against Bell. Accordingly, we see no constitutional violation in the contemned judge sitting in judgment on the contempt charge.

As for Bell's argument that the conviction was flagrantly erroneous under state law, thereby denying him due process, we are not persuaded. Bell's conviction was reviewed three times in the higher California courts. Each time his conviction was allowed to stand. We infer that the higher California courts found the conviction correct under the state law. The contention that the conviction was flagrantly erroneous is therefore without merit.

Conclusion

We hold that § 1222, Code Civ. P., does not violate the equal protection clause of the United States Constitution. We hold also that § 1211, Code Civ. P., was not applied in violation of the due process clause of the Constitution. Accordingly, we reverse and remand with directions to deny the petition for habeas corpus.

Reversed and remanded with directions.[13]

---

13. On June 26, 1974, the Supreme Court decided *Taylor v. Hayes*, ... U.S. ..... (42 U.S.L.W. 5180). There the judge, following the trial, proceeded to hold the petitioner in summary contempt. The Court held in part that because of the acrimony of the confrontation between the trial judge and the contemnor, another judge should have tried the contempt matter.

On July 8, 1974, in *Grossman v. Striepeke* (9 Cir., July 13, 1973, No. 72-2526) unpublished, the Supreme Court vacated the judgment and remanded for reconsideration in view of *Taylor v. Hayes, supra.* (42 U.S.L.W. 3710). As in *Hayes, supra,* the judge, following the trial, held Grossman in contempt.

The factual situations in both *Hayes* and *Grossman* were vastly different from the factual situation in the case at bar. In *Hayes* and *Grossman* the exchanges between the contemnor and the court were acrimonious. In each the contempt was imposed following trial.

In the case at bar, the contempt occurred when the trial was about to start. There was no acrimonious exchange between the

court and contemnor. The judge simply ordered the attorney to proceed with the trial and inquired, "What is your reply to that?" Bell responded, "I refuse to go to trial, your Honor."

In *Hayes*, the Court stated (42 U.S.L.W. at 5183):

> "We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. *Ex parte Terry*, 128 U.S. 289 (1888). The usual justification of necessity, see *Offutt v. United States*, 348 U.S. 11, 14 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial."

By way of comparison with the procedure followed in *Hayes*, the Court notes an important event which ordinarily occurs in a summary contempt proceeding such as we have before us:

> "Even where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.' *Groppi v. Leslie, supra*, 404 U.S., at 504 (and cases cited therein)." 42 U.S.L.W. at 5184 (footnote omitted).

Added enlightenment is found in *Groppi* at the page cited by the Court as authority for its statement:

> "Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present, of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi v. Leslie*, 404 U.S. 496, 504 (1972) (footnote omitted).

Here the record reflects that Bell had an adequate opportunity to speak in his own behalf.

In a companion case decided on the same day as *Hayes, Codispoti v. State of Pennsylvania*, ... U.S. ..... (42 U.S.L.W. 5175 at 5177), the Court said:

> "There are recurring situations where the trial judge, to maintain order in the courtroom and the integrity of the trial process in the face of an 'actual obstruction of justice,' *In re McConnell*, 370 U.S. 230, 236 (1962); see also *In re Little*, 404 U.S. 553, 555 (1972), convicts and sentences the accused or the attorneys for either side for various acts of contempt as they occur. Undoubtedly, where the necessity of circumstances warrants, a contemnor may be summarily tried for an act of contempt during trial and punished by a term of no more than six months. . . ."

If the contempt in the case at bar, occurring at the commencement of a trial, could not be punished summarily by the judge before whom the contempt occurred, then no such contempt could ever be punished by the judge before whom it occurred.

Appendix B

United States District Court,
N. D. California.

EDWARD C. BELL,
Petitioner,

v.

RICHARD D. HONGISTO, Sheriff of the City and County of San Francisco, State of California,
Respondent.

No. C-72 206.

Aug. 16, 1972.

As Amended on Petition for Rehearing
Aug. 25, 1972.

B. E. Bergesen, III, San Francisco, Cal., for petitioner.
Richard M. Sims, III, San Francisco, Cal., for respondent.
Thomas M. O'Connor, City Atty., Raymond D. Williamson, Rene Auguste Chouteau, Deputy City Attys., San Francisco, Cal., for amicus curiae.

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

ZIRPOLI, District Judge.

On January 27, 1972, the Honorable Clayton Horn of the Superior Court in and for the County of San Francisco cited petitioner Edward C. Bell, a member of the bar of the State of California, for criminal contempt and summarily imposed a sentence of five days in jail and a fine of five hundred dollars, which sentence was stayed until February

1, 1972 to permit petitioner to seek habeas corpus relief from the appellate courts. On the same afternoon, the Court of Appeal for the First Appellate District denied petitioner's petition for a writ of habeas corpus without opinion. On January 28, 1972, and again on February 2, 1972, the California Supreme Court also denied two successive, but separate, petitions for habeas corpus. Meanwhile, petitioner had begun serving his sentence in the San Francisco County Jail; on February 3, 1972, he was released by order of this court pending final determination of this cause. The matter came on regularly for hearing on March 21, 1972, and after oral argument counsel for both sides expressed their view that the case was ripe for submission and their corresponding willingness to submit the case at that point for decision by the court.

Although counsel differed slightly in their presentation of the facts of this case, such differences as do exist appear to the court to be inconsequential to this decision. The operative facts, which the court summarizes below, are not in dispute:

On January 24, 1972, petitioner appeared on behalf of three defendants in the case of People v. James, No. 81855, before the Honorable Walter Calcagno, the Master Criminal Calendar Judge of the Superior Court, at which time he renewed a discovery motion which Judge Calcagno had previously denied without prejudice to such renewal. After a conference with counsel, Judge Calcagno scheduled the motion for hearing before him at 11:30 a.m. on January 27, 1972. Petitioner appeared at that time whereupon Judge Calcagno assigned the case, including the motion, to Judge Clayton Horn for trial at 1:30 p.m. and adjourned the proceedings for the noon recess. Petitioner did not immediately exercise his right to disqualify Judge Horn under Section

170.6 of the California Code of Civil Procedure.[1] However, at the conclusion of the proceedings, petitioner, who is apparently inexperienced in handling criminal matters, solicited the advice of two colleagues who told him that in their opinion he should disqualify Judge Horn. After determining to accept their advice in the interests of his clients, petition-

---

1. Section 170.6 provides in pertinent part:

(1) No judge or court commissioner of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or preceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge or court commissioner before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner. Where the judge or court commissioner assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. In no event shall any judge or court commissioner entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. . . .

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge or court commissioner to try the cause or hear the matter. . . .

er prepared and executed an affidavit in support of his motion to disqualify Judge Horn pursuant to the requirements of Section 170.6 and presented the affidavit to Judge Calcagno at approximately 12:55 p.m. when the court reconvened. Judge Calcagno advised petitioner that his challenge to Judge Horn was not timely.

Petitioner reported to Judge Horn's court shortly before 1:30 p.m. and, upon the arrival of the Deputy District Attorney assigned to the case, presented his affidavit to disqualify Judge Horn in chambers. Judge Horn rejected the affidavit and informed petitioner that if he did not proceed to trial he would be held in contempt of court. In response to a direct order to proceed, petitioner refused. Judge Horn cited him for contempt on the basis of his finding that the refusal was "wilful, contemptuous and without sufficient reason or any legal cause." Upon the expiration of the stay granted by Judge Horn, petitioner served nearly two days of his sentence before he was released by order of this court. He is presently at large on his own recognizance.

Petitioner makes three arguments in support of his petition for a writ of habeas corpus. In two related, but conceptually distinct, arguments petitioner attacks on due process ground the manner in which Judge Horn exercised his contempt powers. Petitioner argues, first, that since his motion to disqualify Judge Horn was "timely" under settled principles of California law, his contempt citation was at best arbitrary and at worst discriminatory; and, second, that the use of the summary contempt power in the circumstances of this case was an "abuse" of the court's power. In his third argument, petitioner challenges on equal protection grounds the statutory scheme which excludes both the right to appeal and the right to bail pending appeal as inci-

dents of an adjudication of contempt. The court will consider petitioner's equal protection argument first.

The structure of petitioner's equal protection argument is relatively straightforward. Under California law, every individual convicted of a crime has a right to appeal whether it is a felony or a misdemeanor. Calif.Penal Code §§ 1237, 1466. While bail pending appeal is a matter of discretion for convicted felons, *id.* § 1272(3), convicted misdemeanants are entitled to bail pending appeal as a matter of right, *id.* § 1272(2). Thus, misdemeanants are by California law absolutely entitled to an appeal and bail pending the outcome of that appeal. However, a contemnor has no right to appeal, Calif.Code Civ. Pro. § 1222, or to bail pending appeal.[2] Since criminal contempt is a misdemeanor, Calif.Penal Code § 166, petitioner argues that depriving a misdemeanant contemnor of the right to appeal and bail pending appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. While there is no question that the statutory scheme discriminates against a class of misdemeanants, the question before this court is whether that discrimination is in fact unconstitutional.[3]

---

2. Calif.Code Civ.Pro. § 1222 provides:
"The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." The court may impose a fine not exceeding five hundred dollars or five days imprisonment, or both. *Id.* §§ 1211, 1218.

3. Petitioner challenges the constitutionality of the state statutes here involved insofar as they deny him the right to appeal and bail pending appeal, but he does not seek injunctive relief. Accordingly, although no party to these proceedings has suggested that a three-judge court should be convened, the court observes that a three-judge court is not required. See *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970); United States ex rel. Murray v. Owens, 341 F.Supp. 722 (S.D.N.Y.1972).

In a . ries of decisions throughout the last 30 years the United States Supreme Court has identified a number of interests as "fundamental" and recognized that these interests deserve special consideration under the equal protection clause.[4] While the court has not articulated a general formula to distinguish "fundamental" interests from others, it has deemed these interests important because they are "individual and personal," Reynolds v. Sims, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and touch upon a "sensitive and important area of human rights," Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536, 62 S.Ct. 1110, 1111, 86 L.Ed. 1655 (1942). To be sure, there is some question whether the right to appeal from a criminal conviction and the incidents of that right are constitutional rights. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the Supreme Court held unconstitutional conditioning direct appellate review of a criminal conviction on the defendant's ability to purchase a transcript, but reaffirmed that the right to appeal was not a constitutional right. The Court there said:

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, McKane v. Durston, 153 U.S. 684, 687-688, 14 S.Ct. 913, 914-915, 38 L.Ed. 867. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now

4. *See, e. g.*, Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (interstate travel); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1076, 16 L.Ed.2d 169 (1966) (voting); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (education); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (procreation).

> become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. *Id.* at 18, 76 S.Ct. at 590.

Similarly, in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), the Court held that where the merits of the one and only appeal an indigent had of right were decided without benefit of counsel, there existed an invidious discrimination between the rich and the poor which violated equal protection.[5] See also Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963); Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed. 2d 1209 (1959). As the Court put it in Rinaldi v. Yeager, 384 U.S. 305, 310-311, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966): "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

[1] Thus, while appeal and the right to bail pending appeal may not be constitutional rights, the question yet remains whether the interest which they protect is fundamental for purposes of applying the equal protection clause. In the court's view, it is. What is at stake here is petitioner's transcendent personal interest in his liberty

---

5. To the extent that the underpinning of these cases, notably *Griffith* and *Douglas*, was the fact that the classifications were based on wealth, that underpinning has been seriously eroded by James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971), rev'g 313 F.Supp. 1 (N.D.Cal.1970) (three-judge court).

pending termination of what the State of California recognizes as an integral part of the administration of justice in all misdemeanor cases with the sole exception of misdemeanor contempts.

> [T]he right to bail [pending appeal] is "fundamental" in that it involves issues of personal freedom in the most immediate and literal sense of those words. . . . The harm done to an innocent defendant who "serves time" before his conviction is reversed on appeal cannot be undone and serves as a continuing affront to our sense of justice. There may well be times when the state is justified nonetheless in denying bail pending appeal. But when different standards are applied to bail applications based upon an apparently arbitrary classification, the courts are not obliged to accept hypothetical or unfounded excuses for the distinction drawn. United States v. Thompson, 452 F.2d 1333, 1340 (1971).

Since what is involved is a fundamental right, what Judge Skelly Wright has called "no less than the freedom to be free," *id.*, the court concludes that the classification California has drawn between misdemeanant contemnors and all other misdemeanants must be subjected to close and careful scrutiny.[6]

---

6. Usually, especially in the areas of economic regulation or social welfare, the courts will not overturn a classification the legislature has drawn if it has a "rational basis." See, *e. g.*, Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957). When a legislature creates a "suspect classification," however, the courts insist that the state demonstrate an "overriding purpose." Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), which is subject to "rigid scrutiny" by the courts. Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). When a "fundamental interest" is at stake, the standard of scrutiny approaches the rigor of the latter test. See,

The respondent[7] offers several justifications for the distinction it has drawn. None of these asserted justifications can withstand the strict scrutiny which the court must bring to bear on the classification here involved; the court entertains considerable doubt whether they would be valid even if the court applied the usual equal protection standard which requires only a rational basis for the classification.

First, the respondent argues that the crime here involved is a "petty offense," not a serious crime. However, unlike cases in which such a dichotomy may validly be the basis for disparate treatment when different types of crimes are involved, see Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), here the disparate treatment is accorded to individuals convicted of the same type of crime. The state accords the rights petitioner seeks to persons convicted of all misdemeanors, petty or serious, except misdemeanor contempt. Quite apart from the Supreme Court's rejection of distinctions based on the differences between felony and misdemeanor cases in several recent decisions, see Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971);

---

e. g., United States v. Thompson, 147 U.S.App.D.C. 1, 452 F.2d 1333, 1340 (1971): "The courts have been particularly careful to inspect classifications relating to the criminal process, even in cases where it could not possibly be contended that constitutional rights are involved." (citations omitted)

7. The petition for habeas corpus properly names Richard Hongisto, Sheriff of the City and County of San Francisco, as the respondent. On February 10, 1972, respondent filed a return disclaiming any interest in these proceedings. On February 25, 1972, the Honorable Clayton Horn, by and through the City Attorney of the City of San Francisco, made application to appear as amicus curiae. This application was granted. In the interest of convenience and clarity, however, the word "respondent" is used throughout this opinion.

Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440 (1969), the court cannot distinguish the potential penalties flowing from a misdemeanor contempt conviction from those flowing from other misdemeanor convictions, especially where the collateral consequences of petitioner's conviction may include disbarment. Calif. Business and Prof.Code §§ 6101, 6103.

[2-4] Second, respondent points to the availability of state habeas corpus relief as a substitute for an appeal. However, the Supreme Court has long recognized that the writ of habeas corpus does not perform the office of an appeal. Ex parte Terry, 128 U.S. 289, 305, 9 S.Ct. 77, 32 L.Ed. 405 (1888). See also In re Shipp, 62 Cal.2d 547, 552, 43 Cal.Rptr. 3, 399 P.2d 571 (1965); In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). It is perfectly apparent in California that the procedural and substantive incidents of habeas corpus are not coterminous with the manner and scope of review on appeal. Aside from the summary disposition of habeas petitions, and the restricted scope of inquiry, Ex parte Hadley, 57 Cal.App.2d 700, 135 P.2d 381 (1943); Ex parte Wilson, 123 Cal.App. 601, 11 P.2d 652 (1932), bail is discretionary, Calif.Penal Code § 1476, not a matter of right as on appeal, *id.* § 1272(2). A misdemeanant contemnor may thus serve his entire sentence before obtaining any appellate court consideration at all, even the narrow review available by way of habeas corpus. The mere availability of habeas corpus does not justify denying an appeal to a misdemeanant contemnor any more than its availability would justify denying an appeal to any other class of misdemeanant offenders.

[5] Third, respondent contends that vindicating the dignity of the court justifies summary disposition. While

such an interest historically justifies dispensing with a hearing to establish the fact of a contempt committed in the judge's presence, it does not follow that it justifies depriving the contemnor of the right to appeal. In fact, the absence of any such compelling justification is made manifest by the appellate procedure which obtains in the federal system. See Sacher v. United States, 343 U.S. 1, 12-13, 72 S.Ct. 451, 96 L.Ed. 717 (1952). This court cannot conclude that the considerations which justify a summary adjudication *ipso facto* justify summary imposition of punishment when, in all other misdemeanor cases, imposition of punishment awaits the outcome of an appeal. To be sure, the State may expedite the determination of appeals from contempt convictions if it chooses, but the State has no interest at all in punishing what the respondent concedes is a "petty offender" prior to according him an appeal on the law and facts, which California has determined to be fundamental to insuring the integrity of the criminal process in all other cases.

[6] In conformity with the foregoing opinion, the court concludes that denying a misdemeanant contemnor an appeal and bail pending appeal, rights to which all other misdemeanants are absolutely entitled under California law, violates the Equal Protection Clause of the Fourteenth Amendment. In view of this conclusion, the court expresses no opinion on the validity of petitioner's other constitutional arguments.

It is hereby ordered that the petition for writ of habeas corpus is granted. Petitioner shall have 10 days from the date of this order to file a notice of appeal and application for bail pending appeal in accordance with California law. Petitioner shall continue to be free from the custody of the respondent unless and until he is granted the right

to appeal from his conviction, and, in connection therewith, the right to have bail set pending the determination of said appeal.

Should petitioner not be granted the right to appeal and to have bail set pending appeal, the court will entertain further proceedings and retains continuing jurisdiction for that purpose.

Appendix C

United States Court of Appeals
For The Ninth Circuit

No. 72-2797

Filed—Oct 2 1974

..... Clerk
U. S. Court of Appeals

EDWARD C. BELL,
Petitioner-Appellee,

vs.

RICHARD D. HONGISTO,
Respondent-Appellant.

ORDER DENYING THE PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING IN BANC

Before: CHAMBERS, CARTER and WALLACE, Circuit Judges.

The panel having voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc, and the petition having been circulated to all active judges, and no judge having voted for a rehearing in banc,

IT IS ORDERED that the petition is denied and the suggestion for rehearing in banc is rejected.

Appendix D

In the United States Court of Appeals
For The Ninth Circuit

Civil No. 72-2797

Filed—Sep 19 1974

..... Clerk
U. S. Court of Appeals

EDWARD C. BELL,
Movant-Appellee,

v.

RICHARD D. HONGISTO,
Respondent-Appellant.

DC-C 72-206 A

ORDER

The mandate has been stayed to Sept. 25, 1974.

Appellee having moved for a modification of the order staying issuance of mandate herein, and good cause appearing,

It is ORDERED that the mandate is further stayed for a period of no later than 30 days after appellee's petition for rehearing and suggestion of appropriateness of rehearing in bank is denied, should such denial occur.

Dated: September 17, 1974.

James N. Carter
Circuit Judge